Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-2399 and 82-358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON CO., *et al.*,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION

and

THE UNITED STATES OF AMERICA,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

ROBERT L. BAUM
Counsel of Record
PETER B. KELSEY
EDWARD H. COMER
WILLIAM L. FANG
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

December 16, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, in addition to the Nuclear Regulatory Commission's analysis of the actual impacts of a proposed action on the natural environment, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, requires the Commission to analyze and predict psychological impacts caused by fears concerning that action.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. Congress Intended Environmental Impact Statements To Focus On The Analysis Of Actual Impacts On The Natural Environment	7
II. The Court Of Appeals' Decision Is Inconsistent With Cases That Limit The Content Of Environmental Impact Statements So As To Exclude Consideration Of Psychological Impacts	13
A. Cases Confirm That The Core Concerns Of Environmental Impact Statements Are Actual Impacts On The Natural Environment	13
B. Courts Have Used A Variety Of Rationales To Limit The Content Of Environmental Impact Statements	14
C. Prevailing Cases Hold That NEPA Does Not Require An Analysis Of Psychological Impacts	18
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
Aberdeen & Rockfish R.R. Co. v. SCRAP, 422 U.S. 289 (1975)	4, 13
Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975)	15
Chelsea Neighborhood Ass'ns v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975)	20
Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F.Supp. 908 (D. Or. 1977)	14
City of New York v. U.S. Department of Transportation, 539 F.Supp. 1237 (S.D.N.Y. 1982), *appeal docketed*, No. 82-6094 (2d Cir., filed Aug. 5, 1982)	20
Como-Falcon Coalition, Inc. v. U.S. Department of Labor, 465 F.Supp. 850 (D. Minn. 1978), *aff'd as modified sub nom. Como-Falcon Community Coalition, Inc. v. U.S. Department of Labor*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980)	19
Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977)	15
Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060 (8th Cir. 1977)	15
First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973)	19
Goodman Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir. 1982)	13
Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973)	16, 19, 20
Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972)	20
Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517 (5th Cir. 1978)	13
Kleppe v. Sierra Club, 427 U.S. 390 (1976)	4
Lange v. Brinegar, 625 F.2d 812 (9th Cir. 1980)	15
Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973)	14, 17, 19, 20
Metlakatla Indian Community v. Adams, 427 F.Supp. 871 (D.D.C. 1977)	13

TABLE OF AUTHORITIES—Continued

	Page
Monarch Chemical Works, Inc. v. Exon, 466 F.Supp. 639 (D. Neb. 1979)	19
National Ass'n of Government Employees v. Rumsfeld, 413 F.Supp. 1224 (D.D.C. 1976), *aff'd sub nom. National Ass'n of Government Employees v. Brown*, 556 F.2d 76 (D.C. Cir. 1977)	13
National Organization for Reform of Marijuana Laws v. U.S. Department of State, 452 F.Supp. 1226 (D.D.C. 1978)	14
Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972)	14, 15
Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976)	19
People Against Nuclear Energy v. Nuclear Regulatory Commission, 678 F.2d 222 (D.C. Cir. 1982)	*passim*
Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977)	15
Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973)	16
Sunflower Alliance, Inc. v. Nuclear Regulatory Commission, No. 82-3563 (6th Cir., filed Sept. 13, 1982)	2
Trinity Episcopal School Corp. v. Romney, 387 F.Supp. 1044 (S.D.N.Y. 1974), *rev'd and remanded in part on other grounds*, 523 F.2d 88 (2d Cir. 1975)	19, 20
Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974)	15
United States v. Champlin Refining Co., 341 U.S. 290 (1951)	7
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952)	7
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	16, 18
Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980)	15

TABLE OF AUTHORITIES—Continued

Page

Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981) 4
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) .. 7

STATUTES AND REGULATIONS

National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1976) ..... *passim*
Section 101, 42 U.S.C. § 4331 ..... 5, 6, 12
Section 102(2)(C), 42 U.S.C. § 4332(2)(C) .. *passim*
40 C.F.R. § 1500.6 (1976) 16

LEGISLATIVE DOCUMENTS

A National Policy for the Environment, *Committee on Interior and Insular Affairs*, 90th Cong., 2d Sess. App. A (Comm. Print 1968), *printed in* Joint House-Senate Colloquium to Discuss a National Environmental Policy, *Hearing Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Astronautics*, 90th Cong., 2d Sess. (1968) 7, 9
National Environmental Policy, *Hearing on S.1075 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. App. 1 (1969) 7
S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) .... *passim*
115 *Cong. Rec.* 3698 (1969) 11
115 *Cong. Rec.* 40416, 40417 (1969) 8, 10, 11
115 *Cong. Rec.* 40926 (1969) 10

MISCELLANEOUS

Carson, *Silent Spring* (The Riverside Press, 1962) 8
47 *Fed. Reg.* 31762 (1982) 2
Jackson, *Environmental Policy and the Congress*, PUBLIC ADMINISTRATION REVIEW, July/August 1968 8
In re Metropolitan Edison Co., 11 NRC 297 (1980) 20

TABLE OF AUTHORITIES—Continued

Page

Sands, *Sutherland Statutory Construction*, Vol. 2A (4th ed.) 7
Udall, *The Quiet Crisis* (Holt, Rinehart and Winston, 1963) 8
U.S. Nuclear Regulatory Commission, *Facilities License Application Record*, NUREG-0652, Vol. 1, No. 3 (Feb. 1982) 3
Whitaker, *Striking A Balance* (American Enterprise Institute for Public Policy Research, 1976) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 81-2399 and 82-358

METROPOLITAN EDISON CO., *et al.*,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION

and

THE UNITED STATES OF AMERICA,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitioners Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("Utility Petitioners") and the United States and the United States

Nuclear Regulatory Commission ("Government Petitioners"). Petitioners request this Court to reverse a decision by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"). That decision holds that the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1976), requires the Nuclear Regulatory Commission ("NRC"), in addition to its analysis of the actual impacts upon the natural environment from the operation of a nuclear power plant, to consider the "potential psychological health effects" on area residents resulting from their fears concerning the operation of the plant, even though the NRC's safety analysis concludes that the operation of the plant satisfies all applicable requirements. *People Against Nuclear Energy v. Nuclear Regulatory Commission*, 678 F.2d 222, 235 (D.C. Cir. 1982) ("PANE").[1]

---

[1] Judge Wright, joined by Judge McGowan, constituted the majority on the NEPA issue. Judge Wilkey dissented on this issue. Since petitioners seek review only of this NEPA issue, we will refer to Judge Wright's opinion on the NEPA issue as the majority and to Judge Wilkey's opinion on this issue as the dissent.

We believe the majority's holding cannot be limited to psychological *health* effects characterized as "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." 678 F.2d at 230. The NRC has issued a policy statement narrowly interpreting the Court of Appeals' holding for purposes of its application to administrative proceedings other than TMI-1. 47 *Fed. Reg.* 31762 (1982). This statement attempts to preclude consideration of psychological impact claims in all other proceedings. We agree with the United States and NRC, however, "that the logical implications of the court of appeals' analysis are far broader." Government Pet. for Cert. at 28 n.22. Indeed, absent reversal of this decision, "any Commission ruling excluding psychological stress contentions from a proceeding runs a substantial risk of reversal, for the reasons suggested by Judge Wilkey's dissent." *Id.*; *see Sunflower Alliance, Inc. v. Nuclear Regulatory Commission*, No. 82-3563 (6th Cir., filed Sept. 13, 1982). In all probability, unless this case is reversed it will be cited for the proposition that psychological impacts of whatever sort or degree are cognizable under NEPA.

EEI has obtained the written consent of all parties to this case for the filing of this brief pursuant to Rule 36.2 of this Court. The written consents have been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.6 percent of all customers of the investor-owned segment of the utility industry and 77 percent of the nation's electricity users. This case concerns matters of considerable importance to EEI's members who now or may in the future hold licenses and permits issued by federal agencies and are or will be subject to federal regulatory control.

The decision by the Court of Appeals in *PANE* holds that the psychological impacts which result from fears about a proposed action are cognizable under Section 102 (2) (C) of NEPA, 42 U.S.C. § 4332(2) (C). This will mean that federal agencies must predict the psychological impacts of their actions and, when such impacts are significant, analyze them in an environmental impact statement ("EIS"). This decision directly affects all those nuclear utilities which are regulated by the NRC. EEI member companies currently operate 70 of the nation's 81 nuclear power plants licensed to operate by the NRC and expect to operate an additional 51 units now under construction or in planning.[2] Psychological impact issues have been introduced in at least seven proceedings before the NRC, each of which involves an investor-owned electric utility member or members of EEI. Utility Pet. for Cert. at 9 n.11. In addition, by expanding the factors to be analyzed under NEPA, this decision also affects other aspects of utility operations, such as the transportation

---

[2] U.S. Nuclear Regulatory Commission, *Facilities License Application Record*, NUREG-0652, Vol. 1, No. 3 (February 1982) (updated through December 8, 1982).

of fuel or waste, the construction of hydroelectric dams and the disposal of hazardous waste, which are subject to federal regulatory control that triggers the requirements of NEPA.[3]

---

[3] In addition to the issue presented, EEI shares the views of the Government Petitioners (Gov. Pet. for Cert. at 17-18 n.12), Utility Petitioners (Utility Pet. for Cert. at 7 n.10), *amicus* Atomic Industrial Forum ("AIF") (AIF Brief Supporting Pet. for Cert. at 5-14) and *amicus* American Mining Congress ("AMC") (AMC Brief Supporting Pet. for Cert. at 7-9) that the Court of Appeals, while not compelled to do so under the facts of this case, has reached far beyond NEPA and apposite court decisions by stating that the NRC's continuing regulatory responsibility over licensed nuclear plants is a "Federal action" under Section 102(2)(C) of NEPA. 678 F.2d at 231-232. Thus, the Court of Appeals appears to require, even in the absence of a proposed action, that the NRC continually analyze changed circumstances and new information to determine their threshold significance and, where such significance is found, embark on the full EIS process. As Judge Wilkey observed, "[t]his is a holding of considerable breadth." 678 F.2d at 244.

We agree with the Government and Utility Petitioners, AIF and AMC that this position of the court below is also erroneous. This position conflicts with prior decisions of this Court which have confirmed that the requirement for an EIS in Section 102(2)(C) of NEPA is triggered only by a specific proposal for a major federal action having a significant environmental impact. *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 320 (1975) (*"SCRAP II"*); *Kleppe v. Sierra Club*, 427 U.S. 390, 401-402 nn.12-13 (1976); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 144-145 (1981). In *SCRAP II*, for example, this Court held that an EIS is not required until an agency "makes a recommendation or report on a *proposal* for federal action." 422 U.S. at 320 (emphasis in original). In the absence of a proposal for action, such as a proposal to approve, disapprove, amend, or otherwise change a program or project, an agency's responsibility under Section 102(2)(C) of NEPA is nil.

The position of the Court of Appeals, if not disaffirmed by this Court, is likely to be cited in innumerable proceedings before federal agencies and the courts. Therefore, we urge that in ruling on the issue directly presented in this case, this Court also makes clear that, in the absence of a proposal for action by an agency, Section 102(2)(C) of NEPA does not impose any obligation upon a federal agency.

SUMMARY OF ARGUMENT

This case presents this Court with its first opportunity to examine the limits of the phrase "environmental impact" in terms of the content of an EIS required by Section 102(2)(C) of NEPA. This Court must determine whether, in addition to analyzing the actual impacts of proposed actions on the natural environment, federal agencies must analyze and predict the effects of the public perceptions about and reactions to those proposals.

The concerns which prompted the growth of the environmental movement in the 1960's had their roots in demonstrable evidence that man was despoiling the earth's finite natural resources by polluting the air, water, soil, and living space. In view of this evidence, Congress passed NEPA to insure that whatever the nature of the proposed actions being considered by the federal government, the decisionmaking process would take into account the actual effects of those actions on the natural environment.

It is unquestionably true that references can be uncovered in the legislative history of NEPA to human well-being, including social and psychological well-being. However, these general statements of concern for human well-being should be read as reflecting the broad policy goals of Section 101 of NEPA rather than as specifying factors to be analyzed in an EIS. Because of the recognized dependence of human welfare on the quality of the environment, Congress felt that informed decisionmaking based upon an analysis of the actual impacts of man's activities on the natural environment would promote, as a byproduct, NEPA's broad national policy goals, including psychological well-being.

Judicial decisions confirm the thrust of the legislative history and public consciousness at the time NEPA was enacted by stating that the core concerns of NEPA are actual impacts upon the natural environment. Courts

have applied a rule of reason and other rationales to confine the hard look that agencies must take to environmental effects which can be objectively measured or evaluated. They have done so to avoid diluting the usefulness of the EIS as a decisionmaking tool.

Finally, the federal appellate and district courts which have specifically addressed the issue in this case have, with rare exceptions, held that NEPA does not require agencies to analyze and predict the psychological impacts of proposed actions. The rationale for these holdings is that psychological impacts are too far removed from the purpose of NEPA and are not capable of the type of measurement which would permit meaningful evaluation and prediction in an EIS. This Court should confirm the validity of the reasoning of these cases and hold that, however the limits of an EIS should be defined, psychological impacts caused by public fears about a proposed action fall outside those parameters.

ARGUMENT

NEPA, signed into law on January 1, 1970, 42 U.S.C. §§ 4321 *et seq.*, represents Congress' most comprehensive response to the public's environmental awakening during the 1960's.[4] Section 101 of NEPA, 42 U.S.C. § 4331, established broad national environmental policies. To achieve these policies Section 102, 42 U.S.C. § 4332, established certain "action-forcing" procedures. S. Rep. No. 91-296 at 9. Of these procedures, the requirement to prepare "a detailed statement . . . on (i) the environmental impact of the proposed action" for "major Federal actions significantly affecting the quality of the human environment" (Section 102(2)(C), 42 U.S.C. § 4332(2)(C)) is the action-forcing requirement at issue. This case provides the first opportunity for this Court to

---

[4] *See* S. Rep. No. 91-296, 91st Cong., 1st Sess. 13-14 (1969).

examine the meaning of "environmental impact" in this context.

Stripped of all its embellishments, the fundamental question in this case is whether psychological impacts are required to be included among the "environmental impact[s]" to be analyzed by federal agencies in an EIS. NEPA does not define the phrase "environmental impact." Accordingly, reference to NEPA's legislative history,[5] the public concerns[6] which motivated Congress to act, and relevant court decisions should guide the Court.

I. Congress Intended Environmental Impact Statements To Focus On The Analysis Of Actual Impacts On The Natural Environment.

The statements and writings of the 1960's reflect the public concerns which prompted Congress to enact NEPA.[7] That period was marked by a general awakening of the public consciousness concerning the impact of man's activities on the earth's finite natural resources. Man's technological advances were recognized as potential threats to our long-term health and prosperity because of their impact on these resources.

---

[5] *E.g., United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *see generally* C. Sands, *Sutherland Statutory Construction*, Vol. 2A, § 48.03 (4th ed.).

[6] *E.g., United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950); *see generally* Sands, *supra* n. 5, at § 56.05.

[7] *See, e.g.*, A National Policy for the Environment, *Committee on Interior and Insular Affairs*, 90th Cong., 2d Sess. App. A (Comm. Print 1968), *printed in* Joint House-Senate Colloquium to Discuss a National Environmental Policy, *Hearing Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Astronautics*, 90th Cong., 2d Sess. 87, 117 (1968); National Environmental Policy, *Hearing on S. 1075 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. App. 1, at 181, 192 (Bibliography on Environmental Issues) (1969).

For example, Rachel Carson's publication of *Silent Spring* in 1962 alerted the nation to the public health threat posed by the indiscriminate introduction of chemicals into our environment.[8] Stewart Udall's *The Quiet Crisis* chronicled our diminishing open space and the overall reduction in the quality of our environment due to pollution, noise and blight.[9] The public response to the January 28, 1969, Santa Barbara oil spill gave added impetus for Congress to enact a national environmental policy. "The Santa Barbara incident was comparable to tossing a match into a gasoline tank: it exploded into the environmental revolution. . . ." [10]

The life support systems developed for manned exploration of space during the 1960's provided an apt analogy in the popular literature for man's continued survival on earth.

> Adlai Stevenson, I believe, was the first to note that our space program illustrates the fragile character of the system on which life depends. What is true in a small way of life in a small space ship is true in a large way of the earth. This new living experience of spaceship exploration reminds us that the components and processes of the biosphere cannot be dismantled and disrupted without risk to our survival.

Henry M. Jackson, *Environmental Policy and the Congress*, PUBLIC ADMINISTRATION REVIEW, July/August 1968, at 305. References to our life support system appear repeatedly in the legislative history of NEPA.[11]

---

[8] Rachel Carson, *Silent Spring* (The Riverside Press, 1962).

[9] Stewart L. Udall, *The Quiet Crisis* (Holt, Rinehart and Winston, 1963).

[10] John C. Whitaker, *Striking A Balance* 264 (American Enterprise Institute for Public Policy Research, 1976).

[11] *E.g.*, S. Rep. No. 91-296 at 8, 13; 115 *Cong. Rec.* 40416, 40417 (1969) (remarks of Sen. Jackson).

Congress compiled "a great deal of testimony" and "[e]xtensive collections of commentary" (S. Rep. No. 91-296 at 12) regarding environmental problems before enacting NEPA. From this "voluminous data" (*id.*) the Senate Committee on Interior and Insular Affairs articulated some "basic propositions [which] summarize the situation of contemporary America and the Federal Government regarding the management of the environment." *Id.* These propositions related to "unprecedented pressures upon a finite resource base," "man's ability to alter the physical environment," and "a serious threat to the Nation's life support system." *Id.* at 13.

Among the source material cited by the Senate Committee on Interior and Insular Affairs [12] from which these propositions were derived was a special report to the Committee entitled "A National Policy for the Environment." [13] The report's summation was used virtually without change as the summary section in Senate Report No. 91-296.[14]

> Although historically the Nation has had no considered policy for its environment, the unprecedented pressures of population and the impact of science and technology make a policy necessary today. The expression "environmental quality" symbolizes the complex and interrelated aspects of man's dependence upon his environment. Most Americans now understand, far better than our forebears could, the nature of man-environment relationships. The evidence requiring timely public action is clear. *The Nation has overdrawn its bank account in life-sustaining natural elements. For these elements—air, water, soil, and*

---

[12] S. Rep. No. 91-296 at 11 n.4.

[13] Joint House-Senate Colloquium, *supra* n. 7, at 87.

[14] *Compare* S. Rep. No. 91-296 at 16-17 *with* A National Policy for the Environment *printed in* Joint House-Senate Colloquium, *supra* n. 7, at 115.

> *living space*—technology at present provides no substitutes. . . .
>
> Natural beauty, increased recreational opportunity, urban esthetics and other amenities would be important *byproducts* of a national environmental policy. They are worthy public objectives in their own right. But the compelling reasons for a national policy are more deeply based. The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man's impact on his environment under informed and responsible control. The economic costs of maintaining a life-sustaining environment are unavoidable. We have not understood the necessity for respecting the limited capacities of nature in accommodating itself to man's exactions, nor have we properly calculated the cost of adaptation in deteriorating conditions. In our management of the environment we have exceeded its adaptive and recuperative powers, and in one form or another we must now pay directly the costs of maintaining *air, water, soil, and living space* in quantities and qualities sufficient to our needs.

(Emphasis added.)

The legislative history of NEPA is replete with other expressions of concern for the actual impacts of man's activities. Specific and generic examples of these impacts are predominate: critical air and water pollution problems,[15] soil erosion,[16] degradation of unique ecosystems,[17] Santa Barbara oil well blowout,[18] loss of valuable

---

[15] *E.g.*, S. Rep. No. 91-296 at 4, 8; 115 *Cong. Rec.* 40926 (1969) (remarks of Reps. Saylor, Garmatz); 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[16] *E.g.*, S. Rep. No. 91-296 at 4; 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[17] *E.g.*, S. Rep. No. 91-296 at 4, 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[18] *E.g.*, S. Rep. No. 91-296 at 8.

open spaces,[19] rising noise levels,[20] lack of an assured water supply and the impact of a proposed super-jet airport on Everglades National Park,[21] proliferation of pesticides and chemicals,[22] thermal pollution,[23] radiation hazards[24] and urban crowding and congestion.[25] The common characteristic of these examples is that they involve some form of adverse physical impact upon man or the natural environment.

While there are references in the legislative history to congressional concern for human safety and productivity,[26] social and psychological well-being,[27] and an environment free of hazards to mental and physical well-being,[28] we believe that such references are not intended to govern the content of an environmental impact statement. Rather, these references relate to the broad, com-

---

[19] *E.g.*, *id.* at 4; 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[20] *E.g.*, S. Rep. No. 91-296 at 4; 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[21] *E.g.*, S. Rep. No. 91-296 at 8.

[22] *E.g.*, *id.* at 4, 8; 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[23] *E.g.*, S. Rep. No. 91-296 at 4; 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[24] *E.g.*, S. Rep. No. 91-296 at 4; 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[25] *E.g.*, S. Rep. No. 91-296 at 4; 115 *Cong. Rec.* 40417 (1969) (remarks of Sen. Jackson).

[26] *E.g.*, S. Rep. No. 91-296 at 8-9.

[27] *Id.* at 4.

[28] 115 *Cong. Rec.* 3698 (1969) (statement of Sen. Jackson on the introduction of S. 1075).

prehensive national policy goals enacted by Congress in Section 101 of NEPA.

These national policy goals reflect the understanding of the Congress and the public in the late 1960's that man's welfare in its broadest sense is dependent on maintaining the quality of our natural environment. As the Senate Report stated:

> *To provide a basis for advancing the public interest*, a congressional statement is required of the evolving national objectives of managing our physical surroundings, our land, air, water, open space, and other natural resources and environmental amenities.

S. Rep. No. 91-296 at 6 (emphasis added). While these goals are indeed broad, Congress viewed them as being achieved through a functional, reasonably analytical and objective appraisal of the actual impacts of a proposed action on our natural environment. The EIS requirement in Section 102(2)(C) implements the congressional belief that government decisionmaking should be environmentally informed, that is, based on a hard look at the actual impacts of a proposed action on our natural environment.

The Senate Report indicated that goals such as natural beauty, recreational opportunity, esthetics and other amenities would be important "byproducts" of the implementation of NEPA.[29] We believe that NEPA addresses psychological well-being no differently than it does these other goals. Just as informed decisions concerning actual impacts should enhance natural beauty and esthetics, so should such decisions enhance psychological well-being. This would occur directly by eliminating or mitigating the actual impacts on the natural environment which might give rise to any rational adverse psychological effects and indirectly by analyzing the bases for any rationally perceived harms.

---

[29] S. Rep. No. 91-296 at 17 quoted *supra* at 10.

II. The Court of Appeals' Decision Is Inconsistent With Cases That Limit The Content Of Environmental Impact Statements So As To Exclude Consideration Of Psychological Impacts.

A. Cases Confirm That The Core Concerns Of Environmental Impact Statements Are Actual Impacts On The Natural Environment.

In one of the first NEPA cases presented to this Court, Justice Douglas described NEPA as "a commitment to the preservation of our natural environment." *SCRAP II*, 422 U.S. at 331 (Douglas, J., dissenting in part). Other courts have agreed. The Fifth Circuit stated in *Image of Greater San Antonio, Texas v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978) that "NEPA was enacted in recognition of the effect that man's activities—his technological advances, industrial expansion, resource exploitation, and urban development—have on the 'natural environment.' 42 U.S.C. § 4331. The primary concern was with the physical environmental resources of the nation."

The District of Columbia Circuit affirmed a district court decision which similarly stated that "[t]he primary concern [of NEPA] is the *physical* environmental resources of the nation. *See* S. Rep. No. 296, 91st Cong., 1st Sess. 4-10 (1969)." *National Ass'n of Government Employees v. Rumsfeld*, 413 F. Supp. 1224, 1229 (D.D.C. 1976), *aff'd sub nom. National Ass'n of Government Employees v. Brown*, 556 F.2d 76 (D.C. Cir. 1977) (emphasis in original). Another District of Columbia district court agreed that "the basic thrust of the Act is the management of this nation's physical surroundings and natural resources." *Metlakatla Indian Community v. Adams*, 427 F. Supp. 871, 875 (D.D.C. 1977). The Ninth Circuit stated in *Goodman Group, Inc. v. Dishroom*, 679 F.2d 182, 185 (9th Cir. 1982):

> Relating project impact to effects on the physical environment, such as water, air, and ecosystems, im-

plements the intent of Congress in enacting the statute. *Maryland*[-]*National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1037-39 (D.C. Cir. 1973). The reference point of physical environmental effects serves also to confine scarce resources for EIS preparation to those cases where they are most needed, a goal our circuit has identified as an appropriate one.

The analysis in an EIS of actual impacts on the natural environment extends to the impacts caused by physical agents affecting the human body, as in cases of ingestion of chemicals through the air or water, and exposure to radiation in the air. *National Organization for Reform of Marijuana Laws v. U.S. Department of State*, 452 F.Supp. 1226, 1232 (D.D.C. 1978) (possible damage to human health from toxic herbicides); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F.Supp. 908, 927 (D. Or. 1977) (possible damage to human health from toxic pesticides); *Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1039 (D.C. Cir. 1973) (possible danger to human health from flooding as a result of allegedly inadequate water and oil run-off systems), *cited in* 678 F.2d at 228 & n.8, 238 nn.15-16. However, such an analysis is far different from attempting to predict the public's subjective concerns about and reactions to such actual impacts. Courts have consistently drawn a line on the content of an EIS so as to exclude analysis of the latter kind.

B. Courts Have Used A Variety Of Rationales To Limit The Content Of Environmental Impact Statements.

The issue in this case should be treated in the same manner as in other cases where courts have limited the content of an EIS. In many of these cases courts have applied a rule of reason. The Court of Appeals for the District of Columbia Circuit articulated this rule in *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972):

> [T]he requirement in NEPA of discussion as to reasonable alternatives does not require "crystal ball" inquiry. Mere administrative difficulty does not interpose such flexibility into the requirements of NEPA as to undercut the duty of compliance "to the fullest extent possible." But if this requirement is not rubber, neither is it iron. *The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite.*

(Emphasis added and footnote omitted.)

The Court of Appeals has held that the rule of reason applies to the content and analysis of an EIS. *Realty Income Trust v. Eckerd*, 564 F.2d 447, 454 (D.C. Cir. 1977). It has stated that the requirement of Section 102(2)(C)(i) of NEPA for a "detailed statement" on "the environmental impact" of a proposed action "requires description of reasonably foreseeable effects. A 'rule of reason' is used to ascertain those effects anticipated." *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 798 (D.C. Cir. 1975). Thus, NEPA "do[es] not demand that the agency 'foresee the unforeseeable', make 'crystal ball' inquiries or prophecies instead of predictions. . . ." *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 830 (D.C. Cir. 1977) (footnote omitted). An EIS need not discuss remote and highly speculative consequences. *NRDC v. Morton, supra*, 458 F.2d at 838; *Concerned About Trident, supra*, 555 F.2d at 828; *Environmental Defense Fund, Inc. v. Hoffman*, 566 F.2d 1060, 1067 (8th Cir. 1977); *Lange v. Brinegar*, 625 F.2d 812, 818 (9th Cir. 1980); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

NEPA has also been interpreted to exclude any requirement for the analysis of subjective views as to the merits of policies or proposals which are independent

from their actual environmental impacts. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978), this Court indicated that fundamental policy questions, such as whether to promote development of nuclear energy, should be resolved in Congress and that NEPA is not the appropriate mechanism to address such issues. In a similar vein other courts have held that the subjective views of the public as to the desirability of a proposed action, as opposed to the environmental impact of that action, are beyond the scope of NEPA. *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). These cases reasoned that subjective personal views as to the desirability of a proposal are too far removed from NEPA's goal of obtaining reliable, objective information about the actual impacts of the proposal on the natural environment.[30]

In a related area, an early decision of the Court of Appeals for the District of Columbia Circuit recognized that NEPA does not require an agency to undertake a "hard look" "where the claim of NEPA application is

---

[30] In *Hanly*, the court of appeals held that the degree of public opposition to a proposed action is not to be considered in making the threshold decision whether the environmental impact of the proposal is significant. The Guidelines of the Council on Environmental Quality then in effect provided that an EIS should be prepared for "proposed actions, the environmental impact of which is likely to be highly controversial." 40 C.F.R. § 1500.6 (1976). However, the court of appeals stated that "the term 'controversial' apparently refers to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use, the effect of which is relatively undisputed." 471 F.2d at 830. It further noted that the alternative interpretation would "surrender the determination [when an EIS was required] to opponents of a major federal action, no matter how insignificant its environmental effect when viewed objectively." *Id.* at 830 n. 9A. This approach was fully endorsed by the Fourth Circuit in *Rucker, supra*, 484 F.2d at 162.

focused on alleged esthetic impact and the matters at hand pertain essentially to issues of individual and potentially diverse tastes." *Maryland-National Capital Park, supra*, 487 F.2d at 1039. The Court of Appeals reached this conclusion because of the difficulty of addressing subjective opinions:

> That some, or perhaps all, environmental impacts have an esthetic facet, does not mean that all adverse esthetic impacts affect environment. That is neither good logic nor good law. Some questions of esthetics do not seem to lend themselves to the detailed analysis required under NEPA for a § 102(C) [sic] impact statement. Like psychological factors they "are not readily translatable into concrete measuring rods." *Hanly v. Kleindienst, supra*, 471 F.2d at 833 n.10. The difficulty in precisely defining what is beautiful cannot stand in the way of expressions of community choice through zoning regulation . . . . But the difficulties have a bearing on the intention of Congress, and whether it contemplated, for example, a requirement of a detailed "environmental impact statement," and concomitant investigation, because of the possiblity [sic] that each new Federal construction would be ugly to some, or even most, beholders, on such issues as: Is this proposed building beautiful? Or, what is the esthetic effect of placing the "controversial" Picasso statue in front of the Civic Center building in Chicago?

487 F.2d at 1038 (citation and footnote omitted).

In *Vermont Yankee, supra*, 435 U.S. at 551, this Court applied the rule of reason to NEPA's requirement that an EIS analyze "alternatives to the proposed action", 42 U.S.C. § 4332(2)(C)(iii) (1976), stating:

> But, as should be obvious even upon a moment's reflection, the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate *the concept of alternatives must be bounded by some notion of feasibility.*

(Emphasis added.) A "notion of feasibility" should be applied as well to the environmental impacts analyzed in an EIS in order to avoid a frivolous exercise.

The effect of these decisions has been to maintain the integrity and usefulness of the EIS as a decisionmaking tool. The EIS focuses upon those actual impacts upon the natural environment which can be measured and studied objectively. Courts have not required EIS's to analyze subjective matters, such as personal esthetic tastes or policy opinions, which are further removed from NEPA's core environmental concerns and are difficult to measure and address objectively.

Using the rationale of these cases, this Court should establish that an EIS need not analyze psychological impacts. Such matters are far too subjective, too difficult to measure and too removed from the core concerns of NEPA with respect to actual impacts on the natural environment for Congress to have intended, or this Court reasonably to require, an analysis of such impacts in an EIS. In addition, as utility petitioners show, requiring an EIS to analyze subjective fears and perceptions will divert agency resources from the objective analysis of actual environmental impacts and diminish the relative weight and importance given to such impacts.

C. Prevailing Cases Hold That NEPA Does Not Require An Analysis Of Psychological Impacts.

The prevailing view of the courts of appeals and district courts which have addressed the issue is that NEPA does not require federal agencies to analyze and predict the psychological impacts of a proposed action. The reasoning of these cases has been identified by Judge Wilkey's dissent in this case:

> They are based largely on the fact that psychological concerns are simply too far removed from the purpose of NEPA, which is to ensure that an agency considers the environmental effects of a decision, not

> the reactions of affected individuals to the risk of those environmental effects. They also rest on the inherent difficulties in attempting to measure and incorporate into the environmental analysis the differing psychological states of the affected persons.

678 F.2d at 240. This reasoning is consistent with the legislative history and cases discussed above.

The first prong of the underlying rationale for the decisions identified by Judge Wilkey (678 F.2d at 239-240 & nn.19-21) concerns the focus of an EIS: to analyze the actual impacts of a proposed action on our natural environment. Concerns such as the psychological impacts at issue here are simply too far removed from this focus and from the objective appraisal of such actual impact which Congress expected in an EIS. An examination of the relevant federal district and appellate court decisions in the Second, Seventh, Eighth and District of Columbia Circuits, which are discussed in detail by the petitioners, confirms this point. *Hanly, supra*, 471 F.2d at 833; *Trinity Episcopal School Corp. v. Romney*, 387 F.Supp. 1044, 1078-1079 (S.D.N.Y. 1974), *rev'd and remanded in part on other grounds*, 523 F.2d 88 (2d Cir. 1975); *First National Bank of Chicago v. Richardson*, 484 F.2d 1369, 1380 n.13 (7th Cir. 1973); *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Como-Falcon Coalition, Inc. v. U.S. Department of Labor*, 465 F.Supp. 850, 861-862 (D. Minn. 1978), *aff'd as modified sub nom. Como-Falcon Community Coalition, Inc. v. U.S. Department of Labor*, 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *Monarch Chemical Works, Inc. v. Exon*, 466 F.Supp. 639, 657 (D. Neb. 1979); *Maryland-National Capital Park, supra*, 487 F.2d at 1037.

The second prong of the underlying rationale for the cases identified by Judge Wilkey (678 F.2d at 240-241 & nn.23-24) is that psychological impacts are not suscep-

tible of the kind of measurement which would allow meaningful consideration and prediction in an EIS. *Hanly, supra,* 471 F.2d at 833 n.10 ("psychological factors are not readily translatable into concrete measuring rods"); *Trinity Episcopal School Corp., supra,* 387 F.Supp. at 1078-1079; *Maryland-National Capital Park, supra,* 487 F.2d at 1038.[31]

Two lower court decisions seem to be inconsistent with the prevailing view of the cases discussed above. In one case that is on appeal to the circuit court, *City of New York v. U.S. Department of Transportation,* 539 F.Supp. 1237 (S.D.N.Y. 1982), *appeal docketed,* No. 82-6094 (2d Cir., filed Aug. 5, 1982), the district court required the Department of Transportation to consider community fears of transporting radioactive material. This fails to follow other Second Circuit decisions. *Hanly v. Mitchell,* 460 F.2d 640 (2d Cir.), *cert. denied,* 409 U.S. 990 (1972); *Hanly v. Kleindienst, supra.* Also, *Chelsea Neighborhood Ass'ns v. U.S. Postal Service,* 516 F.2d 378 (2d Cir. 1975), has been cited by People Against Nuclear Energy for the proposition that an agency must analyze in an EIS the emotional well-being of people affected by a proposed action. Reply Brief for Petitioner, Aug. 18, 1981, at 28, *People Against Nuclear Energy v. Nuclear Regulatory Commission,* No. 81-1131 (D.C. Cir.). To the extent it is so read, it is also inconsistent with the *Hanly* decisions.

---

[31] Problems of measurement in the EIS context are particularly acute in this case, where the decisionmaker would face the highly speculative task of predicting the psychological impacts of the restart of TMI-1. The brief of *amicus curiae* Scientists and Engineers for Secure Energy, Inc. highlights the impossible nature of such a task given the current state of the art. Indeed, the only fact-finding body which addressed this issue, the Atomic Safety and Licensing Board, stated, "We cannot identify a source of evidence which would permit the measurement of the psychological stress phenomenon well enough for use in a full-scale cost/benefit balancing in an EIS." *In re Metropolitan Edison Co.,* 11 NRC 297, 305 (1980); Joint Appendix 40-41.

In summary, the EIS has been a useful tool in focusing the attention of decisionmakers on the environmental consequences of federal actions. By doing so, it has fulfilled NEPA's purposes of protecting man's life support systems and, as a consequence, enhancing the quality of life. While the goals of NEPA are broad, courts, in order to preserve the usefulness of the EIS, do not require or permit the use of the document for the debate of policy or matters which are extremely speculative and, in the last analysis, subjective in nature. This Court should preserve the integrity of the EIS process by which the government examines the environmental impact of its actions by making clear that whatever else that examination may encompass, psychological impacts caused by fears are not included.

CONCLUSION

For the foregoing reasons, *amicus curiae* Edison Electric Institute respectfully submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT L. BAUM
Counsel of Record
PETER B. KELSEY
EDWARD H. COMER
WILLIAM L. FANG
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

December 16, 1982